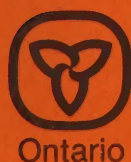
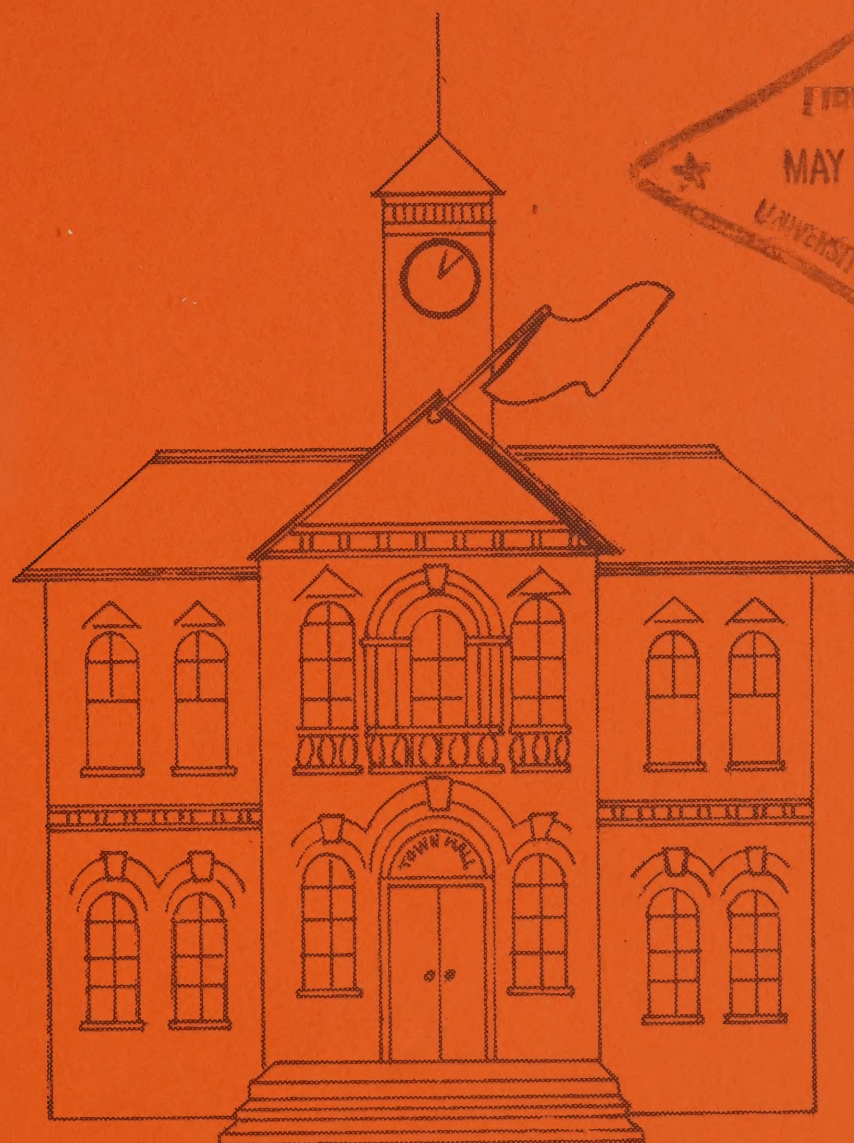


March 1984

BULLETIN 49

THE MUNICIPAL CONFLICT OF INTEREST ACT, 1983

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Ministry of
Municipal Affairs
and Housing

Claude F. Bennett
Minister

Ward Cornell
Deputy Minister

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THE MUNICIPAL CONFLICT OF INTEREST ACT, 1983

Introduction

Principal Features

The Section Explained

Summary

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Since all members should be fully aware of the Municipal Conflict of Interest Act, 1983, it is advisable that this bulletin be placed on the agenda of councils and local boards.



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OVERVIEW

This bulletin discusses the terms and extent of the new Municipal Conflict of Interest Act, 1983. It is intended to emphasize for members of council, boards of education and other local boards the importance of understanding their obligations under the new Act. The bulletin offers a brief outline of the review process which led to the development of the new legislation, outlines the major changes that were made, provides a section by section explanation of the provisions of the legislation and highlights the significant procedures to be followed in determining and declaring a pecuniary interest. The bulletin is not an official statement on the Municipal Conflict of Interest Act, 1983. Only a court can determine if a contravention of the Act has taken place. If there is a possible pecuniary interest, readers are advised to refer directly to the legislation. The Act came into force on March 1, 1983.

INTRODUCTION

On March 1, 1983, a new Municipal Conflict of Interest Act came into force repealing and replacing the original legislation passed in 1972.

The new Act carries on the principal intent of the original legislation which was to require municipal representatives to disclose a pecuniary interest and to abstain from decision-making on the matter.

Prior to 1972 the problem of conflict of interest had been dealt with by prohibiting people from holding office who were likely to have a pecuniary interest.

While the 1972 legislation was basically sound, experience with it brought to light several problems and issues which had not been anticipated in the original drafting. These shortcomings were perceived as detracting from the original principles of the legislation and undermining the public interest it was expected to protect.

In 1979 the Association of Municipalities of Ontario undertook a detailed review of the legislation with a view to resolving the problems which had been identified. The review was followed by an extensive consultation process between the provincial government and the various interested parties culminating in the present legislation.

PRINCIPAL FEATURES OF THE ACT

The essential principle of the legislation continues to be that a member must **disclose** any pecuniary interest he has in a matter before the council or local board and **abstain** from the decision-making process on the matter.

However, many individual provisions have been reworded and re-ordered to clarify this principle, to remove inconsistencies in the original drafting and to provide a more readable act.

Thus, the Municipal Conflict of Interest Act, 1983 is a new rather than an amended piece of legislation.

The most significant features of the new Act are outlined briefly below followed by a more detailed discussion of all the provisions of the Act.

Definition of Interest

The new Act clarifies the list of family members whose pecuniary interests are considered to be the member's interests if he knows of them. The list now includes the member's spouse or common-law spouse, parents and children regardless of whether they live with the member.

The new Act retains the concept of an indirect pecuniary interest. A member is considered to have an indirect pecuniary interest whenever his company, employer, partner or similar, related entity has a pecuniary interest in a matter before the council or local board.

Exempted Interests

All the exceptions under the new Act have been consolidated in one section and the situations where an interest may be considered not to represent a conflict for the member have been expanded to include an instance where the member has an interest which is so remote or insignificant in its nature that it could not reasonably be regarded as likely to influence the member.

Declaring an Interest

Under the new Act a member who has an interest in a matter before the council or local board is required to state that he has the interest and also to disclose the general nature of the interest.

Quorum Provisions

These provisions have been altered in the new Act. If the regular quorum is lost because of any conflict of interest, direct or indirect, as long as two members remain who can vote, the council or local board will be able to decide on the matter.

Paying Legal Expenses

A new provision has been added to the Act which permits a municipality or local board to pay the legal expenses of a member where the courts have determined that the member has not contravened the act. However, if the court determines that the Act has been contravened, no compensation may be made to the member.

Penalties

The new Act provides additional penalties for contravention. If it is determined that a contravention of the Act has resulted in personal financial gain, the judge can order the member to make restitution in addition to declaring the member's seat vacant and disqualifying him from holding office.

PROVISIONS OF THE ACT

Section 1. Interpretation

The Interpretation section of any Act provides the precise meaning and extent of key terms used throughout the legislation.

Several new definitions have been added and others altered in the Municipal Conflict of Interest Act, 1983 in order to clarify the application of the Act.

The most significant changes are highlighted below.

Section 1 (d) Definition of 'Elector'

The term "elector" is now used instead of the narrower term "ratepayer". This reflects the intention of the legislation to permit any person eligible to vote at an election in the municipality to apply to the judge for a determination of whether the Act has been contravened.

Section 1 (f) Definition of 'Judge'

This definition has been moved from the body of the old legislation into the Interpretation section of the new Act. It has also been expanded to include not only a county or district court judge, but also a judge in an adjoining county or district to ensure that there will be a judge available to hear any proceedings.

Section 1 (g) Definition of 'Local Board'

In the interest of clarity and easy reference, a list of the bodies affected by the Act is now provided. Those committees and local boards which are excluded for the purposes of the legislation are also listed. Readers will no longer have to refer to other statutes for this information.

Section 1 (h) Definition of 'Meeting'

This definition means that the provisions of the Act regarding disclosure of interest apply to any meeting of a council or local board, whether regular, special or committee.

Section 1 (n) Definition of 'Spouse'

This definition is consistent with the Family Law Reform Act and has been provided to clarify the family interests which are considered to be those of the member under Section 3 of the Act. The term "spouse" is defined to include various forms of common-law relationships. The terms "parent" and "child" are also defined in the new legislation for the same purpose.

Sections 2 and 3 What are Pecuniary Interests?

The word **pecuniary** means consisting of, measured in or relating to money. In other words, a pecuniary interest, whether direct or indirect, does not have to be cash; it would include unrealized gains or losses which could be measured in money. It does not mean simply having an opinion, bias or generally being in favour of or opposed to particular courses of action.

Section 2 of the legislation defines those situations where a member has an **indirect pecuniary interest** because of a business relationship. Specifically, a member has an indirect pecuniary interest in a matter before the council or local board only if he or his nominee:

- . is a director or senior officer in either a public or private corporation,
- . is a shareholder in a private corporation,
- . has a controlling interest in a public corporation,
- . is a member of a body that has a pecuniary interest, or

- . is a partner of a person or is in the employ of a person or body that has a pecuniary interest in the matter.

If Section 2 is read together with the relevant definitions of "controlling interest" and "senior officer" provided in Section 1, a member will be better able to determine whether he has an indirect pecuniary interest as a result of a business relationship.

Section 3 deals with pecuniary interests in terms of a member's **family interests**.

The new Act specifies that the pecuniary interest of the spouse, parent or child of a member, whether it is a direct or indirect interest, is considered to be the member's own interest if he knows about it. Relatives other than those specified are not covered by the statute.

Again, if a member reads Section 3 in conjunction with the new definitions of "spouse", "parent" and "child" provided in Section 1, he will be better able to determine those family interests which may affect him.

Section 4. Exempted Interests

This section provides a list of the situations where a member may have a pecuniary interest which is not considered to present a conflict and to which the Act does not, therefore, apply. In the situations outlined a member need not disclose the pecuniary interest.

These pecuniary interests relate to:

- . being a user of any public utility service supplied by the municipality or local board on the same basis as it is supplied to other persons,

- . being entitled to receive a service, commodity, subsidy, loan or other such benefit offered by the municipality or local board on the same terms as other persons,
- . purchasing or owning a debenture of the municipality or local board,
- . having made a returnable deposit with the municipality or local board on the same terms as other electors,
- . having an interest in any property affected by a work under the **Drainage Act** or the **Local Improvement Act**,
- . having an interest in farm lands exempted from taxation under the **Assessment Act**,
- . being considered for election or appointment to fill a vacancy, office or position on the council or local board which may have a pecuniary benefit for the member,
- . being a director or senior officer of a corporation incorporated to carry on business for or on behalf of the municipality or local board,
- . being an appointee of the council or local board as a member of a board, commission or other body,
- . receiving an allowance for attendance at meetings,
- . receiving an allowance, honorarium, remuneration, salary or benefit by reason of being
 - a member of the council or local board
 - appointed commissioner, superintendant or overseer of a local works project (see The Municipal Act, s.252, RSO 1980)
 - a member of the municipality's volunteer fire brigade,

- . having a pecuniary interest which is an interest in common with electors generally, and
- . having a pecuniary interest which is so remote or insignificant in its nature that it cannot reasonably be considered as likely to influence the member.

The last two exceptions place a special onus on the member to decide whether an interest he has, which is not otherwise specifically excepted, can be excepted because it is an interest held in common with electors generally or is remote and insignificant. A common example of a remote and insignificant interest could be simple membership in a large community service club. However, it is strongly suggested that a member seek legal advice from his own solicitor if he is unsure about the nature of a pecuniary interest he has in a matter.

Section 5. Disclosing a Pecuniary Interest

This section of the Act outlines what a member is required to do if he has a pecuniary interest in a matter under consideration by the council or local board.

"Member" is defined simply in the Interpretation Section as being a member of a council or local board. However, since the Municipal Act defines "member" specifically to include heads of council and members of boards of control, it would be prudent for these members to ensure they adhere judiciously to the procedures of the Municipal Conflict of Interest Act, 1983 in respect of declaring a pecuniary interest.

There are three different procedures to be followed depending on the kind of meeting and whether the member having the conflict is present at the meeting when the matter is being considered.

The procedures are:

1) Member is present at meeting open to public

If a member has a direct or indirect pecuniary interest in a matter being considered at a meeting by the council or local board either himself or while acting for, by, with or through another he is required:

- i) to disclose the interest and its general nature before any discussion of the matter takes place,
- ii) not to take any part in the discussion of the matter,
- iii) not to vote on any question in respect of it, and
- iv) not to try to influence the voting at any time before, during or after the meeting.

2) Member is present at meeting **not open** to the public

Where the meeting is not open to the public, the member must follow the procedures outlined above and must also:

forthwith leave the meeting or that part of the meeting during which the matter in which he has a pecuniary interest is being considered.

3) Member is **not present** at a meeting

If a member has a pecuniary interest in a matter, but was not in attendance at the meeting at which it was considered, he must:

make the disclosure and follow the procedures described above at the first meeting he does attend after the meeting at which the matter was considered.

These procedures for disclosing pecuniary interests differ from the previous legislation in that the general nature of the interest must also be provided by the member and the member is specifically prohibited from attempting at any time to exert any influence on the matter.

Section 6. Recording the Disclosure

Where a pecuniary interest has been disclosed by a member at a meeting which is open to the public, the clerk of the municipality or the secretary of the local board is required to record the disclosure and the general nature of the interest in the minutes of the meeting.

Where a pecuniary interest has been disclosed at a meeting which is not open to the public, the clerk or secretary is required to record only the disclosure in the minutes of the next meeting that is open to the public.

The difference in disclosure requirements for open and closed meetings recognizes that the confidentiality of a closed meeting might be jeopardized if a member were required to place on public record the nature of his pecuniary interest in a matter. The intent of the legislation is served, however, by the requirement that a

members' disclosure of a pecuniary interest during a closed meeting must be recorded in the minutes of the next meeting that is open to the public as well as the applicability of the prohibitions against the member discussing or voting on the matter.

Section 7. Where the number of disclosures destroys the Quorum

The new Act significantly broadens the provisions for protecting the quorum. The earlier legislation provided that the regular quorum could be waived only if the disclosure of interest related to indirect pecuniary interests by reason of the members' employment.

The new provision deals with any pecuniary interest for which the Act requires disclosure. It provides a means for councils or local boards to continue acting on a matter which they would be prevented from proceeding with if the number of members disclosing a pecuniary interest left an insufficient number of members to form the quorum.

Subsection 7(1) provides that as long as two members remain who are able to participate in the consideration of a matter, the two members will constitute the necessary quorum.

If it happens that only **one**, or **no** member is able to participate, the council or local board may apply to a judge for an authorization to consider, discuss and vote on the matter.

In this case, the judge may make an order (1) declaring that the section 5 disclosure requirements do not apply and (2) authorizing the members of the council or local board to consider and vote on the matter. The judge is also empowered to make conditions and directions in the order as he considers appropriate to the matter.

Sections 8 and 9. Dealing with an alleged Contravention

Who Can Make an Application?

The right and responsibility to make an allegation that a member of council or a local board has contravened the Act lies with the electors of the municipality. If the allegation concerns a member of council or any local board except a school board, elector means any person who is entitled to vote in an election in the municipality. But, if the allegation is against a school board representative, only an elector entitled to vote for the board can make it. In other words, a public school elector could not make an allegation against a member of the separate school board in the municipality and vice versa.

What Authority Deals With an Application?

Alleged contraventions of the Act are tried by a judge of the county or district court in which the municipality is located or, in the case of a local board, where the head office is located.

When Can an Application be Filed?

An elector has six weeks from the time he learns of an alleged contravention to take action, but in no event may an application be made after six years from the time the contravention is alleged to have occurred.

This is significantly different from the old legislation which placed the time limit at the end of the term of office of the member in question.

How is an Application Made?

If an elector believes that a contravention of the Act has occurred, he may apply to the judge in the form of an "originating notice of motion" as prescribed by the rules of the court. An originating notice of motion is basically the applicant's written statement that a contravention has occurred under section 5 of the Act and it outlines the grounds of the contravention. The rules of the court require that the person against whom the allegation is made must also be notified of the application.

Section 10. Penalties for Contravention

If a judge determines that a contravention of the Act has occurred he is required to declare the member's seat vacant. He **may also** disqualify the member from holding local public office for a period of up to seven years.

However, if the judge determines that the contravention occurred through inadvertance or a bona fide error in judgment he cannot declare the member's seat vacant, nor may he disqualify the member or a former member from holding local, public office.

In any instance of contravention which has resulted in personal financial gain the judge is empowered to require the member or former member to make restitution to any party suffering a loss. If the party suffering the loss cannot be readily identified, restitution could be made to the municipality or local board. This provision for restitution is new.

Section 10 also clarifies that suspending a member from office is not an acceptable substitute for declaring the member's seat vacant where he has been found to have wilfully contravened the Act.

Section 11. Appeals Against the Judge's Order

If either the member or the elector who made application is dissatisfied with the decision of the judge, an appeal may be lodged with the Divisional Court of The Supreme Court of Ontario. The Divisional Court may either give a final judgment or may grant a new trial for the purpose of hearing additional evidence. If a new trial is set, the order arising from it may also be appealed.

Section 12. Effect of a Contravention of the Act on Council or Local Board Proceedings

This section addresses the situation where a member takes part in a matter before the council or local board and is subsequently found to have contravened the Act by failing to declare a pecuniary interest or failing to abstain from the decision-making process on the matter. The Act provides that the proceedings are not invalidated unless the council or local board decides within two years to void them. However, the new Act makes the additional provision that the council or local board may not void its proceedings if doing so would have an adverse effect on an innocent third party.

Section 13. Conflict of Interest Dealt With Only Under This Act

This new provision simply clarifies that the only legal recourse for dealing with a conflict of interest situation is through the procedures of the Municipal Conflict of Interest Act, 1983. There is another kind of procedure under common law called "quo warranto" which may be used to challenge a person's right to hold public office. However, Section 13 makes it clear that this kind of proceeding cannot be used for a conflict of interest situation.

Section 14. Municipal Insurance or Compensation for Conflict of Interest

This is a new section which provides that a municipal council may:

- 1) pass a by-law to authorize the purchase of insurance to protect members of council or any local board members from the costs or expenses of conflict of interest litigation, or
- 2) pass a by-law to re-imburse a member for his expenses incurred in conflict of interest litigation.

However, reimbursement for costs or expenses may be made only if the member has been found not to have contravened the Act.

A local board may also contract for such insurance for its members under the same conditions.

By-laws passed under Section 14 may also protect a member who was brought to court under the Act, but ceased to be a member by the time the court's decision was delivered.

This new section and its companion Subsection 16 (2) override the general power of municipalities and local boards under Section 248 of the Municipal Act to contract for insurance to protect members who become involved in litigation.

In addition, it may be useful to point out that a member may purchase individual insurance which would provide coverage in a situation where he was found to have contravened the Act, but the judge has determined that the contravention was committed through inadvertence or as a result of a bona fide error in judgment under Subsection 10(2) of the Act.

Sections 16–22. Other Legislation Amended

These provisions amend various other acts to clarify their relationship to and reflect the purpose of the Municipal Conflict of Interest Act, 1983. Of particular significance is Section 17 which amends the Child Welfare Act to provide that for the purposes of the Municipal Conflict of Interest Act, 1983, a Children's Aid Society is deemed to be a local board of each municipality in which it has jurisdiction.

Section 23. Time Limit on the Old Act

The original conflict of interest legislation has been repealed by the new statute and all alleged contraventions occurring after March 1, 1983 must be heard under the new Act. Section 23 has provided a period for the conclusion of proceedings under the old legislation.

Section 24. The Effective Date

The Municipal Conflict of Interest Act, 1983 came into effect on March 1st, 1983.

SUMMARY

- . The Municipal Conflict of Interest Act, 1983 applies to all members of municipal councils and local boards of municipalities.
- . The obligations of the Act are those of the individual members. Other members or staff of the municipality or local board should not be asked or expected to determine if a member has a pecuniary interest in a matter.
- . If a member thinks he has a pecuniary interest in a matter being considered by the council or local board, he must also determine whether it is a direct or indirect pecuniary interest. It may be helpful for the member to ask himself: "Could I or my family or my business associates (as defined in the legislation) possibly stand to gain or lose anything from the consideration of this matter which could be measured in money?"
- . If the member determines that he has a pecuniary interest, he should then look at Section 4 to determine whether the interest he has in a matter is one that is excepted by the legislation.
- . **If the member has any doubts about whether he has a pecuniary interest and whether it can be excepted, he would be wise to seek legal advice from his own solicitor.**
- . If the member's interest cannot be excepted under Section 4, he must declare his interest in the following manner:
 - 1) disclose the interest and its general nature at the meeting prior to any discussion on the matter taking place,

- 2) refrain from taking part in the discussion of the matter,
 - 3) make no attempt to influence the voting at any time before, during or after the meeting, and
 - 4) refrain from voting on the matter.
- . If the matter in which the member has a pecuniary interest is discussed at a meeting closed to the public, the member must declare his interest as outlined above and also leave the meeting, or that portion of the meeting, dealing with the matter.
 - . If the matter in which the member has a pecuniary interest is discussed at a meeting he has not attended, it is the member's duty to declare his interest in the appropriate manner at the first meeting he does attend afterward.

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